IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 569 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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OMPRAKASH JALAN - Appellant
Versus
LAXMINARAYAN OMPRAKASH PROP. OMPRAKASH FAMILY TRUST & 3 – Respondents

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Appearance :

MR TS NANAVATI for Appellant : 1,
RULE SERVED for Respondents : 1 - 3.
MR BR GUPTA for Respondents : 1 - 3.
MR MA PATEL ADDL PP for Respondents : 4,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 21/03/2007

ORAL JUDGMENT

1. Heard learned counsel for the respective parties.

2. The appellant – original complainant has preferred this appeal under Section 378 of the Code of Criminal Procedure, 1978 (hereinafter referred to as 'the Code' for short) against the order dated 6.9.2000 passed by learned Metropolitan Magistrate, Court No.2, Ahmedabad in Criminal Case No. 696 of 1999 acquitting the present respondents original accused of the charge of committing offence punishable under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as 'the N.I. Act' for short). The order dated 6.9.2000 was passed under Section 256 of the Code as neither the complainant nor his advocate was present in the Court till 17-30 hours.

3. Brief facts leading to filing this appeal deserve to be set out as under.

4. The appellant – original complainant had to file a Criminal Complaint in the Court of Metropolitan Magistrate, Court No.2, Ahmedabad against the present private respondents – original accused alleging that three cheques issued by respondents totalling for Rs.2,50,000/- issued in the month of February, 1999 were returned unpaid and therefore, necessary notice was issued calling upon the respondents to make the payment of the cheque amount. Despite the notice, cheque amount had not been paid by the respondents original

accused in statutory time and therefore, the complaint was filed. The trail Court registered the case and gave its registration number being Criminal Case No. 696 of 1999. The process was issued on 6.4.1999. Thereafter, the matter was taken up on different occasions. On 6.9.2000, learned Magistrate has dismissed the Criminal Case as the complainant and his advocate could not remain present till 17-30 hours and acquitted the accused of the charge of committing offence under Section 138 of the N.I. Act. This order passed by learned Magistrate dated 6.9.2000 is impugned in the present appeal.

5. This Court (Coram: B.J.Shetha,J.) vide order dated 20.7.2001 granted leave and admitted the Appeal. Learned counsel for the appellant was permitted to place on record the certified copy of the Rojkam of the trial Court.

6. Shri Nanavati, learned counsel for the appellant has submitted that non-appearance of the appellant and his counsel was on account of mistake in recording the next date of hearing by the counsel who represented the appellant before the trial Court and therefore, none of them could have remained present on 6.9.2000. It is submitted that the date, which was recorded by learned counsel representing the appellant was 7.9.2000 and in fact, the trial Court had

adjourned the matter on 6.9.2000. Due to this inadvertent mistake in recording the date of hearing, the appellant and his Advocate could not remain present on 6.9.2000. Shri Nanavati, learned counsel appearing for the appellant has submitted that the Apex Court in case of ***MOHD. AZEEM VS. A. VENKATESH AND ANOTHER*** reported in (2002) 7 SCC p.726 in a case, where on account of such mistake the counsel and the complainant could not remain present, the Apex Court set aside the order of Magistrate and restore the matter. Shri Nanavati, learned counsel has also relied upon the decision of this Court in case of ***RATANLAL GULABCHAND GUPTA VS. SAHARA SEV GRUH UDHYOG BHANDAR & ORS.*** reported in 2001 (4) GLR p.2987 and submitted that the order of Magistrate has in fact resulted into miscarriage of justice and the appellant is left without any remedy against the respondents accused. Shri Nanavati, therefore, submits that the order of Magistrate may be quashed and set aside and the matter be remanded back for decision on merits after affording an opportunity to both the parties to lead their evidences.

7. Shri Gupta, learned counsel for the respondents has submitted that the trial Court was absolutely justified in passing the order under Section 256 of the Code as the Court after having waited till 17-30 hours had to pass the impugned order as none appeared on behalf of the

Advocate for the complainant and the complainant himself had remained absent. The reading of Section 256 clearly show that the Magistrate had no other course open to him but to dismiss the complaint as no other request for adjourning the matter on behalf of them had ever been made to him and in such a situation, the Magistrate's order cannot be said to be in any way illegal, perverse or meriting any interference by this Court. Shri Gupta has submitted that the cause, which is now pressed into service was not before the Magistrate at all. Shri Gupta has submitted that the affidavit, which is filed before this Court in the present proceedings by the appellant is merely a hear say evidence and that affidavit in itself cannot be said to be a cogent evidence so as to believe the case of the appellant. Shri Gupta has submitted that even in the case before the Apex Court, the Apex Court observed in Paras 3 and 4 that 'sufficient cause' was made out and therefore, the restoration was ordered. In the instant case, looking to the conduct of the parties, it cannot be said that the 'sufficient cause' was ever made out. Shri Gupta has submitted that in view of this, the appeal deserves to be dismissed.

8. This Court has heard the learned counsel for the parties and perused the Rojkam produced on the record of the case. It appears that the order of dismissal was passed by the Magistrate after

waiting upto 17-30 hours and no request was made before the learned Magistrate for adjourning the matter and accordingly, learned Magistrate has passed the order of dismissal of the complaint and acquitted the accused. The impugned order has in fact, left the appellant without any remedy.

9. In the appeal under Section 378 of the Code, the Court is to see whether any miscarriage of justice has resulted on account of the order impugned. In the instant case, as it is seen from the record, the the complainant had no notice about the next date of hearing and therefore, it can well be said that he relied upon his counsel who represented him in the trial Court for noting down the date. The Apex Court has also in identical situation held that such a ground is 'sufficient ground' for explaining the absence of the complainant and the Advocate. This Court is therefore, of the considered view that the order of Magistrate impugned in this appeal deserves to be quashed and set aside and the matter deserves to be remanded to the concerned Court for hearing the same on merits after giving reasonable opportunity to the parties.

10. In view of this, the appeal is partly allowed. The order impugned dated 6.9.2000 passed by learned Metropolitan Magistrate, Court No. 2,

Ahmedabad in Criminal Case No. 696 of 1999 is hereby quashed and set aside. The matter is remanded back to the trial Court so that the same can be heard on merits after affording reasonable opportunity to both the parties. Order accordingly. Record and Proceedings be sent forthwith to the trial Court.

(S.R.BRAHMBHATT, J.)

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